No. 80-487

Supreme Court, U. S.
FILED
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In The

Supreme Court of the United States

October, 1980

WILLIAM HARPER, M.D., *et al.*,

Petitioners,

vs.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether respondents' denial of the Variable Incentive Pay (VIP) authorized by 37 U.S.C. §§302-313 to petitioners is contrary to the clearly expressed intent of Congress, in both the VIP statute and its legislative history, that petitioners be eligible for VIP following completion of four years of active duty service.

2. Whether respondents' denial of the VIP to petitioners violates petitioners' Fifth Amendment rights to due process of law, since respondents, while denying petitioners VIP because of their participation in an armed services medical school scholarship program, provided VIP payment to identically situated, equally or less qualified peers of petitioners, who also participated in armed services medical scholarship programs and received equal or greater scholarship support than petitioners.

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* Petitioners in this action are William Harper, M.D., Charles Pamplin, M.D., Joseph Frerkes, M.D., J.D. Fitz, M.D., Frank Conn, M.D., Robert Redfield, M.D., John Hanson, M.D., and Marshall Feaster, M.D. Respondents are the United States of America, Jimmy Carter, President of the United States, James T. McIntyre, Director of Office of Management and Budget, Clifford J. Alexander, Secretary of the United States Army, Edward Hidalgo, Secretary of the United States Navy, John C. Stetson, Secretary of the United States Air Force, and Elmer B. Staats, Comptroller General of the United States.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Citations ii

Opinions Below 1

Jurisdiction 1

Statutes and Regulations 2

Statement of the Case 2

Reasons For Granting the Writ 8

Conclusion 13

TABLE OF CITATIONS

Johnson v. Robison, 415 U.S. 301 (1974) 9, 13

United States v. Larionoff, 431 U.S. 864 (1977) 10

Manhattan General Equipment Co. v. CIR, 297 U.S. 129 (1936) 10

Statutes Cited:

5 U.S.C. §701-706 2

Contents

Page

10 U.S.C. §2023 2

10 U.S.C. §§2120-2127 ..... 2, 6, 11

28 U.S.C. §1254(1) 2

28 U.S.C. §1331(a) 2

28 U.S.C. §1346(a)(2) 2

28 U.S.C. §1361 2

28 U.S.C. §2201 2

28 U.S.C. §2202 2

37 U.S.C. §302-313 ..... i, 2, 3, 8, 10, 11

United States Constitution Cited:

Fifth Amendment ..... i, 9, 13

Other Authorities Cited:

DOD Directive 1340.11 ..... 2, 3, 4, 5, 6, 7, 10

S. Rep. No. 658, 93rd Cong., 1st Sess. 14, 15 (1973) 5, 11

H.R. No. 93-883, P.L. 93-274 (Dec. 19, 1975) 4, 13

H. Rep. 93-883, 93rd Cong, 2nd Sess. 6 (1974) 5

Contents

Page

H. Rep. 93-863, 93rd Cong., 2nd Sess. (1974), reprinted in U.S. Code Congressional and Administrative News, 2923-2935 5

Conf. Report No. 93-984 2nd Sess. reprinted in 1974 U.S. Code Congressional and Administrative News, 2937-2938 .....5, 12

Hearings on Investigation into the Failure of the Department of Defense to Properly Implement Doctor-Bonus Law Before Subcommittee No. 4 of the Committee on Armed Services, House of Representatives, 93rd Cong., 2nd Session (1974) 7

APPENDIX

Appendix A — Judgment of the United States Court of Appeals Filed May 20, 1980 ..... 1a

Appendix B — Order of the United States Court of Appeals Filed June 18, 1980 ..... 3a

Appendix C — Order of the United States Court of Appeals Filed June 18, 1980 ..... 4a

Appendix D — Order of the United States District Court Filed January 19, 1979 ..... 5a

Appendix E — Excerpts of Transcript of Proceedings Dated January 19, 1979 ..... 6a

Appendix F — Relevant Statutes 10a

No.

In The

Supreme Court of the United States

October, 1980

WILLIAM HARPER, M.D., *et al.*,

Petitioners,

vs.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The judgment of the Court of Appeals (App. A, *infra,* 1a) and the order of the District Court (App. D, *infra,* 5a) below are not reported. The oral ruling of the District Court is set forth in Appendix E 6a to 9a).

JURISDICTION

The judgment of the Court of Appeals was entered May 20, 1980. A timely petition for rehearing, and suggestion for

rehearing *en banc,* were denied June 18, 1980 (App. C, 4a, App. D, 5a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS

The applicable statutes and regulations are set forth at Appendix F, *infra,* 10a-29a), and are respectively P.L. 93-274, 88 Stat. 94, codified at 37 U.S.C. §313; P.L. 92-426, 86 Stat 78, codified at 10 U.S.C. §§2120-2123; Department of Defense Directive 1340.11.

STATEMENT OF THE CASE

This case was brought pursuant to 28 U.S.C. §§1331(a), 1361, 2201, 2202, 1346(a)(2) and 5 U.S.C. §§701-706, by ten officers in the medical corps of the armed services to recover for themselves and their putative class $9,000 in annual incentive pay to which they had been denied.

Petitioners obligated themselves to military service by contracting to participate in the Armed Forces Health Professions Scholarship Program (AFHPSP), 10 U.S.C. §§2120-2127 (enacted September 21, 1972). By participating in the AFHPSP, petitioners received a stipend of $400 per month plus tuition, books, fees, miscellaneous expenses, and the pay and allowances of an 0-1 for up to forty-five days of active duty each year. In return, petitioners incurred at least a year for year obligation, the minimum obligation being for two years. Section 2023(b) of the statute governing the AFHPSP provides that AFHPSP participants may not satisfy *this* obligation through participation in a military internship and residency.

The AFHPSP is but one of several support programs the armed services employ in attempting to staff their respective

medical corps. AFHPSP physicians, however, are the only military physicians who do not begin to receive $9,000 Variable Incentive Pay (VIP) following four years of active duty service. DOD Directive No. 1340.11 (III H) (September 12, 1974). The AFHPSP exclusion from bonus eligibility results solely from the Department of Defense's implementation of the VIP statute, which Congress enacted May 6, 1974. P.L. 93-279, 88 Stat. 94, 37 U.S.C. §§302-313. DOD Directive 1340.11 (III D) prohibits AFHPSP physicians, but not participants in other DOD sponsored scholarship programs, from crediting time spent in internship and residency toward receipt from VIP. The Directive prohibits the AFHPSP physicians from crediting internship and residency time toward VIP eligibility because respondents took the position that since petitioners cannot credit time spent in internship and residency to pay back their AFHPSP obligation, they also cannot count that time toward fulfilling the prerequisites for the bonus provided in the VIP statute enacted two years following the AFHPSP statute. The disparate treatment the services accord similarly situated participants in the Senior Medical Program (SMP) and the services' active duty scholarship programs (*e.g.*, AR 601-112) demonstrates respondents' arbitrary, irrational, and illegal implementation of the VIP statute.

The SMP is not specifically authorized in law, but is, instead, an administrative program in which a medical student in his senior year is commissioned in the grade 0-1 and paid the pay and allowances of that grade during that year. In return, the SMP participant incurs a three year obligation. Under the SMP program, however, time spent in internship or residency is creditable toward receipt of VIP, and although the SMP participant is obligated to serve three years following the completion of residency, he is eligible for VIP payment at that time.

Similarly, individuals who participate in active duty scholarship programs are allowed to count time spent in internship and residency toward VIP eligibility. These individuals received ROTC support or graduated from a service academy, incurring an active duty obligation from that program and becoming commissioned upon graduation. If at that time, they applied and were accepted for medical school, they received the full pay and allowance of their pay grade, plus full tuition, books and fees. These persons are also eligible for VIP upon the completion of residency, even though they are also performing obligated service.

Congress' purpose in passing the Variable Incentive statute legislation was to bring medical officers' salaries into parity with the salaries of health professionals in the private sector, thereby ensuring an adequate supply of health professionals in the all volunteer military. House Report No. 93-883, P.L. 93-274 (December 19, 1975) at 2. The Act revised the pay scale of medical officers in the United States military by providing them with VIP not to exceed $13,500 in addition to any other pay or allowances to which they are entitled. By regulation, the Department of Defense has provided that eligible physicians serving periods of obligated service are to receive an annual bonus of $9,000. DOD Directive 1340.11 (III H). To qualify for VIP, a medical officer must (a) be below the pay grade of 0-7; (b) be designated as being qualified in a critical speciality by the secretary concerned; (c) be determined, by a board composed of officers in the medical profession under criteria prescribed by the secretary concerned, to be qualified to enter into an active duty agreement for a specified number of years; (d) not be serving an initial active duty obligation of four years or less, or not be serving the first four years of an initial active duty obligation of more than four years; (e) not be undergoing intern or initial residency training; (f) execute a written active duty agreement under which he will receive incentive pay for completing a

specified number of years of continuous active duty subsequent to executing such an agreement; and (g) have the above referenced agreement accepted by the secretary or his designee.

Because respondents base their denial of VIP eligibility to petitioners solely on subsection (d) it is important that the legislative origins of this section be made clear. As originally proposed and passed by the Senate, the VIP statute would have applied to all qualified medical officers. S. Rep. No. 658, 93rd Cong. 1st Sess. 14, 15 (1973). Because the Department of Defense indicated to the House Armed Services Committee its intention not to pay bonuses to interns and residents, or those undergoing initial obligated service, the House amended the Act to exclude those persons from bonus eligibility. H. Rep. 93-883, 93rd Cong. 2nd Sess. 6 (1974), Conf. Report No. 93-984, 93rd Cong. 2d Sess., *1974 U.S. Code Congressional and Administrative News,* at 2937-2938. In the Conference on the VIP bill, the Senate conferees were concerned with the "possible inequities or adverse retention effects which could occur as a result of extended initial obligated service which some physicians have." Because of this concern and

> ". . . to avoid inequities or avoid adverse retention impact, the conferees agreed to language in the conference report which provides that the exclusion from new bonuses for those in initial obligated active duty shall apply only for the first four years of such active duty obligation." *Id.* at 2938.

Four months following the enactment of the VIP statute, the Secretary of Defense, on September 12, 1974, issued Department of Defense Directive No. 1340.11 concerning VIP for medical officers. In this Directive, the Office of General Counsel of the Department of Defense interpreted Public Law

93-274 to prohibit AFHPSP participants from crediting time spent in internship or residency toward satisfying the initial active duty obligation under the VIP statute. The Office of General Counsel based its conclusion on the AFHPSP statute, 10 U.S.C. §2123(b), which states that "time spent in military intern or residency training shall not be creditable in satisfying an active duty obligation imposed by this section." Accordingly, the Office of General Counsel inserted the following provision in Directive No. 1340.11:

> "Except for those programs in which participation in intern or residency training is specifically prohibited by statute or regulation from being creditable towards satisfying an initial active duty obligation, a period of time spent in intern or initial residency training while on active duty may be creditable in satisfying an initial active duty obligation."

As a result of the Office of General Counsel's action, petitioners were barred from crediting active duty service in internship and residency toward satisfying their initial active duty obligation for VIP. As a result of this interpretation, petitioners were denied eligibility for VIP while other medical officers of equal or lesser training who had also received financial assistance from the Government during medical school were receiving it.

This interpretation of the VIP statute by the Department of Defense clearly was inconsistent with the intent of Congress, as set forth in the Conference Report, that VIP payment be denied for only the first four years of active duty service. Because of the Department of Defense's failure to implement properly the VIP statute, the House Armed Services Committee convened investigatory hearings on September 25, 1974, before the

Military Compensation Subcommittee on Armed Services. During the hearings, Representative Stratton, Chairman of the Subcommittee and one of the House Managers of the VIP bill, and Mr. Ford, Counsel for the Subcommittee, pointed out that it was Congress' intent that once a medical officer is commissioned, he will be denied the bonus only for the first four years of his active duty obligation, whether all or part of the period is spent in internship and/or initial residency training. Hearings on Investigation into the Failure of the Department to Properly Implement Doctor-Bonus Law Before Subcommittee No. 4 of the Committee on Armed Services, House of Representatives, 93rd Congress, 2nd Session, pp. 416-417 (1974).

Following the Stratton Committee hearings, the Department of Defense concluded that Congress intended petitioners and others similarly situated as medical officers to be eligible for their VIP bonuses upon completing four years of active duty, and to permit time spent in intern or residency training to be credited towards satisfying their initial active duty obligation for VIP. Subsequently, the Department of Defense issued proposed changes to its Directive No. 1340.11. These changes would have credited in time spent in internship and residency toward the initial four years active duty obligation imposed by the VIP statute. The amended regulation would have entitled petitioners to receive the $9,000 annual VIP paid obligated officers.

The Department of Defense forwarded the proposed changes to Directive No. 1340.11 to the Office of Management and Budget, which refused to implement these changes, taking the position that while payment to AFHPSP participants after four years of active duty is "permissible" under the VIP statute, it is not "mandatory".

After exhausting all non-judicial remedies, petitioners filed this suit on June 13, 1978. On January 11, 1979, the District Court dismissed petitioners' compiaint with prejudice, ruling that petitioners' initial active duty obligations for VIP purposes do not commence until the completion of residency (App. E, 16a-19a). Since the entry of the District Court's ruling, Congress has twice amended the VIP Act. Effective October 1, 1979, section 303(a) of Title 37, United States Code, was amended to provide specifically that persons ". . . serving an active duty obligation resulting from a medical education program leading to appointment or designation as a medical officer . . . shall be paid $9,000 for each year of the active duty agreement." P.L. 96-107 §804(b). Subsequently, the Uniformed Services Health Professions Special Pay Act of 1980, effective July 1, 1980, completely revised the special pay program for military physicians to provide higher pay entitlements and no reduction in special pay because of obligated status. P.L. 96-289. Because neither of the amendments to the 1974 version of the VIP Act are retroactive, several hundred military physicians remain wrongfully denied the incentive pay to which they were entitled prior to the amendments.

REASONS FOR GRANTING THE WRIT

1. This petition is based upon the error of the Court of Appeals in denying Variable Incentive Pay (VIP) to petitioners and a putative class of military physicians despite their clear eligibility for VIP payment pursuant to both the plain language and legislative history of the VIP statute. 37 U.S.C. §§302-313 (May 6, 1974). As such, this petition involves important questions of the appropriate range of judicial review to determine legislative intent inasmuch as the rulings below discounted entirely the Stratton Committee hearings held within four months and in the same Congress as that which enacted the VIP statute. The record of these hearings, which provides direct

evidence that the conferees intended all military physicians to be eligible for VIP payment following four years of active duty service, is an interpretive aid which the courts below improperly failed to consider. In addition, the decision below fails to redress respondents' arbitrary and irrational exclusion of a single class of military scholarship participants [petitioners who participated in the Armed Forces Health Professions Scholarship Program (AFHPSP)] from VIP payments while respondents have provided VIP payments to identically situated and equally or less qualified participants in other military scholarship programs who received equal or greater scholarship benefits than did petitioners. Respondents' implementation of the VIP statute violates petitioners' Fifth Amendment rights to due process and equal protection of the law under the rule stated by this Court in *Johnson v. Robison,* 415 U.S. 301, 374-375 (1974):

> ". . . [A]lthough an individual's right to equal protection of the laws does not deny . . . the power to treat different classes of persons in different ways . . . [it denies] the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria unrelated to the objective of that statute. A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike. *Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920); *Reed v. Reed,* 404 U.S. 71, 75-76 (1971)."

2. The exclusion of AFHPSP physicians from bonus eligibility results soley from the implementation of the VIP statute by the Department of Defense. The implementing

regulation [DOD Directive 1340.11 (III D)] prohibits AFHPSP physicians, but not participants in other DOD sponsored medical school scholarship programs, from crediting internship and residency service toward VIP eligibility. This provision of the implementing regulation is inconsistent with the VIP statute under which it was promulgated and therefore is a nullity. *United States v. Larinoff*, 431 U.S. 864, 873 (1977), *citing Manhattan General Equipment Co. v. CIR*, 297 U.S. 129, 134 (1936). Under the provisions of 37 U.S.C. §313(a)(4) petitioners clearly are eligible for VIP upon completion of four years active duty military service spent in internship and residency because, at that time, petitioners are not "serving an initial duty obligation of more than four years" [and are "not serving the first four years of an active duty obligation of more than four years . . ." 37 U.S.C. §313(a)(4)]. Petitioners are eligible for VIP at this point because, in obligating themselves to serve four years on active duty during internship and residency, they serve their initial active duty obligation. Significantly, the VIP Act does not define the term "initial active duty obligation." However, the regulation implementing the VIP Act [DOD Directive 1340.11 (II C)] defines "initial active duty obligation" as follows:

> "*Initial Active Duty Obligation. The first obligation to serve on active duty for a specified period of time imposed on medical officers* by a statute other than section 313 of title 37 U.S. Code [reference (a)], *by contract or agreement*, or by a regulation issued by the Secretary of Defense or the Secretary of a Military Department. Those officers who entered on active duty, other than under a special procurement program, on or after July 2, 1973, will not be considered as having an initial active duty obligation and shall not incur such an obligation solely as the result of the commissioning process." (Emphasis supplied.)

3. Thus, under the implementing regulation, a military doctor incurs his or her "first obligation to serve on active duty for a specified period of time" by executing a contract to serve a military internship and a military residency. Thus, the provision of the AFHPSP statute, 10 U.S.C. §2123(b) that "a period of time spent in military intern or residency training shall not be creditable in satisfying an active duty obligation imposed by this section," is not relevant to determining whether, by incurring an active duty obligation preceding that imposed by the AFHPSP, an SFHPSP participant may acquire and fulfill an active duty obligation for VIP purposes under 37 U.S.C. §313(a)(4). Moreover, this construction of the VIP statute follows 37 U.S.C. §313(d) which provides:

> "This section does not alter or modify any other service obligation of an officer. Completion of the agreed period of active duty, or other termination of an agreement, under this section, does not entitle an officer to be separated from the service if he has any other service obligation."

It is clear from §303(d) that, in enacting the VIP statute, Congress recognized that two or more service obligations would run consecutively, and elected to limit any exclusion from bonus eligibility to a uniform period of four years.

4. The conclusion that when Congress limited this exclusion to four years, and not nine years, or more as the Government suggests, is inescapable when the legislative history of the VIP Act is reviewed. As passed by the Senate, the Senate, the VIP statute applied to all medical officers. S. Rep. No. 658, 93rd Cong. 1st Sess. 14, 15 (1973). Because the Department of Defense indicated to the House Armed Services Committee its intention not to pay bonuses to interns and residents, or those undergoing initial obligated service, the House amended the Act

to exclude those persons from bonus eligibility. H. Rep. 93-984, 93rd Cong., 2nd Sess. (1974). *U.S. Code Congressional and Administrative News,* at 2937-2938. However, because of the concern of the Senate conferees with the "possible inequities or adverse retention effects which could occur as a result of extended initial obligated service which some physicians have," the conferees limited the exclusion from bonus eligibility to the first four years of initial obligated active duty. *Id.* at 2938. Clearly, the purpose of the Conference amendment was to limit the exclusion from bonus eligibility to a uniform four year period of initial active duty service, and not, as the Government contends, to adopt a sliding scale under which some physicians would be paid after four years service, while other similarly situated physicians would be denied the bonus for upwards of nine years.

5. As noted above, the services maintain two procurement programs (Senior Medical Program; Active Duty Scholarship Program) for military physicians under which VIP payments are made following the completion of four years active duty service partially or wholly spent in internship and residency. Upon completion of residency, participants in these programs, just as participants in the AFHPSP, are obligated to serve the number of years of active duty specified in their scholarship agreements. Unlike AFHPSP participants, however, Senior Medical Program and Active Duty Scholarship Program participants who received equal or greater scholarship benefits, receive the full $9,000 annual bonus for the remainder of their obligated service period beyond residency. The equally or better qualified AFHPSP participant, with the same number of years in service, equal or better professional training and standing, works side by side with the Senior Medical participant or Active Duty Scholarship participant but receives $9,000 less annual pay. Because the classification contained in Section III D of the implementing Directive bears absolutely no relation to the object

of the VIP legislation (". . . to increase the pay differential provided to medical . . . officers in the uniformed services in an attempt to meet the severe problems of these services in attracting health professionals in an all volunteer environment." H. Rep. No. 93-883, 1974 *U.S. Code Congressional and Administrative News,* Second Session, Vol. 2 at 2925), it must fall under the Fifth Amendment due process clause. *Johnson v. Robison,* 415 U.S. 301, 374-375 (1974).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

STEPHEN DANIEL KEEFFE
Attorney for Petitioners

APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FILED MAY 20, 1980

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1402 September Term, 1979

Civil No. 78-1070

Filed May 20, 1980

George A. Fisher
Clerk

William Harper, M.D., et al.,

Appellants

v.

The United States of America, et al

Appeal from the United States District Court for the District of Columbia.

Before: TAMM and MIKVA, Circuit Judges and JOYCE GREEN*, United States District Judge for the District of Columbia

This cause came on to be heard on the record on appeal from the United States District Court for the District of

* Sitting by designation pursuant to 28 U.S.C. §292(a).

Columbia, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. *See* Local Rule 13(c).

On consideration of the foregoing, it is ordered and adjudged by this Court that the judgment — of the District Court appealed from in this case is hereby affirmed.

Per Curiam
For the Court
s/ George A. Fisher
Clerk

Bills of costs must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FILED JUNE 18, 1980

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1402 September Term, 1979

Filed June 18, 1980

William Harper, M.D., et al.,

Appellants

v.

The United States of America, et al.

BEFORE: Tamm and Mikva, Circuit Judges; and Joyce Hens Green*, Judge, United States District Court for the District of Columbia

Upon consideration of appellants' (Harper, et al.) petition for rehearing, it is

ORDERED, by the Court, that appellants' aforesaid petition for rehearing is denied.

Per Curiam
FOR THE COURT:

s/ George A. Fisher
Clerk

---

* Sitting by designation pursuant to Title 28 U.S.C. §292(a).

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FILED JUNE 18, 1980

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1402 September Term, 1979

Filed June 18, 1980

William Harper, M.D., et al.,

Appellants

v.

The United States of America, et al.

BEFORE: Wright, Chief Judge; McGowan, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, Mikva, and Edwards, Circuit Judges

The suggestion for rehearing *en banc* filed by appellants' (Harper, et al.) having been transmitted to the full Court and no judge in regular active service having requested a vote with respect thereto, it is

ORDERED, by the Court, that appellants' aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam
FOR THE COURT:

s/ George A. Fisher
Clerk

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FILED JANUARY 19, 1979

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1070

Filed Jan. 19, 1979

James F. Davey, Clerk

WILLIAM HARPER, M.D., et al.,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA, et al.,

Defendants.

Having considered defendants' Motion to Dismiss and any opposition thereto, and being advised in all the premises, it is this day

ORDERED that plaintiffs' complaint be and hereby is dismissed with prejudice for failure to state a claim upon which relief can be granted.

s/ George L. Hart, Jr.
UNITED STATES DISTRICT JUDGE

DATE 1/19/79

APPENDIX E — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS DATED JANUARY 19, 1979

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action 78-1070

WILLIAM HARPER, M.D.,

Plaintiff,

vs.

UNITED STATES OF AMERICA, et al.,

Defendants.

Washington, D.C.

Friday, January 19, 1979

The above-styled cause came on for hearing before THE HONORABLE GEORGE L. HART, Jr., United States District Judge, at 2:00 o'clock p.m.

APPEARANCES:

On behalf of the Plaintiff:

STEPHEN D. KEEFE, Esq.

On behalf of the Defendants:

LAWRENCE J. JENSEN, Attorney
Department of Justice.

Appendix E

* * * * *

E. Alfred Kaufman
Official Reporter

[Commencing at page 47]

* * *

hang your hat on that. You have to look and see what was the intent of Congress if doctors elected to go in and serve a four-year obligation knowing full well that during the period of time that they serve that four-year obligation, like Dr. Harper did, as an intern and resident, knowing full weel [sic] that you also had an additional two years to serve, that you shouldn't be deprived a bonus.

Four years active duty as a Medical Corps officer you are entitled to the bonus.

THE COURT: Well, the trouble as I see it is that I cannot interpret what Congress had to say except by what they said, and what they said seems to me plain, although silly.

MR. KEEFE: Well, we certainly have some help as to what they said. We can look at the Conference Report and also look to the question of the hearings afterwards, some good evidence of what they said, and they said count to four, one, two, three, four, and don't start all this business about what your program is called for one place or another.

For example, Mr. Jensen says, well, it's a seven-year obligation that they referred to in the University Program. Well,

that's a seven-year obligation when you come out of the University Program, but of course, you can't work off any part of that obligation during internship or residency like everybody else, so it's an eleven-year program.

So he would suggest to you if somebody came out of the [48] University Services Hospital Program the way Dr. Harper did, that they would serve as a medical officer for five years at Walter Reed and then have a seven-year obligation on top of that, and you wouldn't be paid your bonus until you served another four years, you would be nine years before you got your bonus. Congress said four, it didn't say nine.

THE COURT: Well, they said it can't be paid during the initial active duty obligation.

MR. KEEFE: That's correct.

THE COURT: It seems to me clear here the initial active duty obligation, for example, for the doctor involved here, is July 1978. Now, I don't know how to change that, and I don't like it, and I am going to sustain the motion to dismiss, and if you go to the Court of Appeals and get me reversed, I will be very happy.

MR. KEEF: [sic] Thank you, sir. And I have every confidence I will do so.

THE COURT: Thank you.

[Hearing concluded.]

* * * * *

Appendix E

CERTIFICATE OF REPORTER

I hereby certify that the foregoing 48 pages contain the official transcript of proceedings had in the above-styled cause.

s/ E.A. Kaufman
Official Reporter

APPENDIX F — RELEVANT STATUTES

37 U.S.C. §313. Special pay: medical officers who execute active duty agreements

"(a) Under regulations prescribed by the Secretary of Defense or by the Secretary of Health, Education, and Welfare, as appropriate, and approved by the President, an officer of the Army or Navy in the Medical Corps, an officer of the Air Force who is designated as a medical officer, or a medical officer of the Public Health Service, who—

"(1) is below the pay grade of O-7;

"(2) is designated as being qualified in a critical specialty by the Secretary concerned;

"(3) is determined by a board composed of officers in the medical profession under criteria prescribed by the Secretary concerned to be qualified to enter into an active duty agreement for a specified number of years;

"(4) is not serving an initial active duty obligation of four years or less or is not serving the first four years of an initial active duty obligation of more than four years;

"(5) is not undergoing intern or initial residency training; and

"(6) executes a written active duty agreement under which he will receive incentive pay for completing a specified number of years of continuous active duty subsequent to executing such an agreement;

may, upon acceptance of the written agreement by the Secretary concerned, or his designee, and in addition to any other pay or allowances to which he is entitled, be paid an amount not to exceed $13,500 for each year of the active duty agreement. Upon acceptance of the agreement by the Secretary concerned, or his designee, and subject to subsections (b) and (c) of this section, the total amount payable becomes fixed and may be paid in annual, semiannual, or monthly installments, or in a lump sum after completion of the period of active duty specified in the agreement, as prescribed by the Secretary concerned.

"(b) Under regulations prescribed by the Secretary of Defense, the Secretary concerned, or his designee, may terminate, at any time, an officer's entitlement to the special pay authorized by this section. In that event, the officer is entitled to be paid only for the fractional part of the period of active duty that he served, and he may be required to refund any amount he received in excess of that entitlement.

"(c) Under regulations prescribed by the Secretary of Defense or by the Secretary of

Health, Education, and Welfare, as appropriate, an officer who has received payment under this section and who voluntarily, or because of his misconduct, fails to complete the total number of years of active duty specified in the written agreement shall be required to refund the amount received that exceeds his entitlement under those regulations. If an officer has received less incentive pay than he is entitled to under those regulations at the time of his separation from active duty, he shall be entitled to receive the additional amount due him.

"(d) This section does not alter or modify any other service obligation of an officer. Completion of the agreed period of active duty, or other termination of an agreement, under this section does not entitle an officer to be separated from the service, if he has any other service obligation.

"(e) The Secretary of Defense and the Secretary of Health, Education, and Welfare shall each submit a written report each year to the Committees on Armed Services of the Senate and House of Representatives regarding the operation of the special pay program authorized by this section. The report shall be on a fiscal year basis and shall contain—

> "(1) a review of the program for the fiscal year in which the report is submitted; and

"(2) the plan for the program for the succeeding fiscal year. This report shall be submitted not later than April 30 of each year, beginning in 1975.".

Sec. 2. The amendments made by this Act become effective on the first day of the first calendar month following the date of enactment. Except for the provisions of section 313 of title 37, United States Code, as added by section 1(4) of this Act, which will expire on June 30, 1976, the authority for the special pay provided by this Act shall, unless otherwise extended by Congress, expire on June 30, 1977.

Approved May 6, 1974.

Appendix F

September 12, 1974
NUMBER 1340.11

ASD (H&E)

DEPARTMENT OF DEFENSE DIRECTIVE

SUBJECT Variable Incentive Pay for Medical Officers

Refs.: (a) Section 313 of title 37, U.S. Code
(b) Section 205 of title 37, U.S. Code
(c) DoD Directive 1340.8, "Continuation Pay for Medical and Dental Corps Officers," (under revision)
(d) DoD Directive 5154.13, "Procedures for the Approval of Regulations Pertaining to Military Pay and Allowances," May 1, 1958
(e) DoD Instruction 7110.1 "Guidance for Preparation of Budget Estimates, Operating Budgets, Financial Plans and Apportionment Requests, and Related Support Material," August 23, 1968

I. PURPOSE

This Directive establishes Department of Defense policies governing the payment of variable incentive pay to medical officers under reference (a).

II. DEFINITIONS

A. Medical Officers. An officer on active duty in one of the following categories:

Appendix F

An officer in the U.S. Army who is in the Medical Corps;

An officer in the U.S. Navy who is in the Medical Corps;

An officer in the U.S. Air Force who is designated as a medical officer.

B. Critical Specialty. Categories of medical officers in which the supply of qualified personnel is, or is projected to be, inadequate to meet military service requirements as designed by the Secretary of the appropriate Military Department and approved by the Secretary of Defense.

C. Initial Active Duty Obligation. The first obligation to serve on active duty for a specified period of time imposed on medical officers by a statute other than section 313 of title 37, U.S. Code (reference (a)), by contract or agreement, or by a regulation issued by the Secretary of Defense or the Secretary of a Military Department. Those officers who entered on active duty, other than under a special procurement program, on or after July 2, 1973, will not be considered as having an initial active duty obligation, and shall not incur such an obligation solely as the result of the commissioning process.

D. Long-Term Medical Training Obligation. An obligation incurred by an individual as a result of

participating in military funded medical training of one school year or more. This medical training will include both that received in preparation for commissioning as a medical officer, as well as that received subsequent to commissioning as a medical officer.

E. Initial Residency. An initial residency shall be construed to be that period of time in residency training prior to formal completion of the officer's first residency.

III. POLICIES AND RESPONSIBILITIES

A. Variable incentive pay shall be used as a responsible management tool with respect to officers qualified in critical specialties by:

1. Paying a bonus to medical officers based on current shortages, and projected shortages.

2. Fostering utilization policies so that medical officers will be assigned in accordance with their critical skills, career patterns, and the contingencies and requirements of the individual Military Departments.

B. To be eligible for variable incentive pay, a medical officer must:

1. Be in pay grade O-3, O-4, O-5, or O-6; and

2. Not be serving as an intern or in initial residency program while on active duty; and

3. Have no disqualifying active duty obligation.

C. A disqualifying active duty obligation is an obligation to enter or remain on active duty incurred as a result of:

1. An initial active duty obligation of 4 years or less, or the first 4 years of an initial active duty obligation of more than 4 years.

2. An agreement entered into by an officer in a Reserve component to enter active duty after completion of a period of professional education and training (e.g., Berry Plan, Reserve Officers Training Corps Program, Senior Medical Student Program, Armed Forces Health Professions Scholarship Program).

3. Participation in an educational program in which the officer was on active duty during the period of the time he attended the professional school that qualified him as a medical officer. Disqualification for this training will not exceed the first 4 years of an initial active duty obligation.

4. An agreement entered into under the continuation pay program for medical officers. Officers receiving continuation pay who otherwise are eligible to receive variable incentive pay may repay the prorated unearned amount of continuation pay and thereby be eligible immediately to receive variable incentive pay.

D. Except for those programs in which participation in intern or residency training is specifically prohibited by statute or regulation from being creditable toward satisfying an initial active duty obligation, a period of time spent in intern or initial residency training while on active duty may be creditable in satisfying an initial active duty obligation.

E. Officers who are eligible for variable incentive pay will be placed in one of the following categories in accordances with subsection I., below:

1. An officer qualified in a designated critical specialty whose professional qualifications or demonstrated performance, in relation to his Military Department's need for such officers, indicates that a premium should be placed on his procurement or retention in the active service.

2. An officer qualified in a designated critical specialty whose professional qualifications or demonstrated performance indicates that no premium should be placed on his procurement or continued active service.

F. Officers qualified in a designated critical specialty who are placed in category 1., above, may be offered an active duty agreement of 1, 2, 3, or 4 years, as indicated in the table in H., below, except that an officer may not be offered an agreement for a number of years greater than that remaining to a mandatory retirement. Officers in II. D. with existing service obligations as a result of extended medical training funded by the military will receive reduced amounts as indicated for obligated officers in the table in H., below. An officer who is placed in category 2., above, may not be offered any active duty agreement under the variable incentive pay program.

G. If an officer who enters an active duty agreement subsequently enters intern or initial residency training, or enters a civilian education program in excess of 100 days other than subspecialty or medical fellowship training, he must voluntarily terminate his active duty agreement under this Directive prior to entry into such program. Recoupment in such instances will be on a pro rata basis.

Appendix F

H. Except officers with service obligations in F. above, entitlements shall be determined by the years of service computed in accordance with section 205, title 37, U.S. Code (reference (b)) and the length of the active duty agreement. The annual amount of variable incentive pay to which a medical officer is entitled under the provisions of this Directive is shown in the following table:

Appendix F

MEDICAL OFFICERS VARIABLE INCENTIVE PAY ENTITLEMENT
(In Dollars Per Year)

Years of Service Computed Under Sec. 205, Title 37, U.S. Code	Length of Active Duty Agreement			
	1 Year	2 Years	3 Years	4 Years
4 through 13	$12,000	$12,500	$13,000	$13,500
14 through 19	11,500	12,000	12,500	13,000
20 through 25	11,000	11,300	11,600	12,000
26 or more	10,000	10,300	10,600	11,000
Obligated Officers	9,000	9,000	9,000	9,000

I. The Secretaries of the Military Departments, or their designees, shall elect the medical officers under their jurisdiction subject to limitations in E. and H., above, who will be entitled to variable incentive pay from officers qualified in a designated critical specialty who:

1. Are determined by a board of medical officers to be qualified to enter into active duty agreement for a specified number of years; and

2. Execute a written active duty agreement containing the terms of entitlement to variable incentive pay.

J. Upon acceptance of a written agreement by the Secretary of the appropriate Military

Department, or his designee, and subject to K. and L., below, the total amount payable under the agreement becomes fixed and may be paid immediately upon signing the agreement in equal annual, semiannual, or monthly installments; or in a lump sum after completion of the period of the active duty specified in the agreement, at the option of the officer concerned.

K. The Secretary of the Military Department, or his designee, may terminate a medical officer's entitlement to variable incentive pay, at any time, upon a determination by a board composed of medical officers, that the officer's performance has deteriorated to a level at which no premium should be placed on his continued service. In the event of such termination of entitlement, the officer shall be entitled to be paid only for the proportionate part of the period of active duty that he served under the agreement, and he shall refund any amount he received in excess of that entitlement.

L. A medical officer who has received payment under this section and who voluntarily, or because of his misconduct, fails to complete the total number of years of active duty specified in the written agreement shall be required to refund the amount received that exceeds his entitlement, as prescribed below, except as provided in G., above. However, such termination of his agreement will not entitle him to be separated from the service, and any such separation shall be

governed by other appropriate regulations and policies. If an officer has received less incentive pay than he is entitled to under this directive at the time of his separation from active duty, he shall be entitled to receive the additional amount due him.

Percent of Total Agreement Sum to Which an Officer Who Voluntarily Terminates His Agreement is Entitled

Length of Agreement	Number of Years Completed Under Agreement				
	Less than 1	1	2	3	4
4 years	0%	15%	40%	70%	100%
3 years	0%	22%	60%	100%	
2 years	0%	35%	100%		
1 year	0%	100%			

M. If a medical officer dies or is retired for disability while serving an active duty agreement, his entitlement shall be the proportionate part of the period of active duty that he served under the agreement. Any amount he received in excess of that entitlement shall be recouped by the Government unless the Secretary of Defense, or his designee, determines that recoupment of the excess would not be in the best interest of the Government.

N. A medical officer may be transferred from one critical skill to another and eligibility reconfirmed by the Selection Board with the approval of the Secretary of the Military Department concerned, or his designee.

Appendix F

O. The Secretaries of the Military Departments shall:

1. Include the costs of the program in budget estimates for military personnel appropriations under the provisions of DoD Instruction 7110.1 (reference (e)).

2. Submit proposed implementing instructions for review by the military Pay and Allowances Committee in accordance with DoD Instruction 7110.1 (reference (e)).

3. Submit statistical data and analyses as requested by the Assistant Secretary of Defense (Health and Environment) for preparation of the annual report to the Congress on this program. This information requirement is assigned RCS DD-H&E(A) 1353.

4. Recommend changes in the variable incentive pay program to the Secretary of Defense through the Assistant Secretary of Defense (Health and Environment).

P. The Assistant Secretary of Defense (Health and Environment) shall:

1. Monitor and evaluate Military Department programs to ensure effective use of program funds, making

recommendations to the Military Departments and, when necessary, to the Secretary of Defense in respect to individual programs.

2. Prepare the annual reports pertaining to this program as required by the Congress.

3. Issue DoD Instructions, as required, to carry out the purpose of this Directive.

IV. EFFECTIVE DATE AND IMPLEMENTATION

This Directive is effective September 5, 1974. Six copies of implementing instructions shall be forwarded to the Assistant Secretary of Defense (Health and Environment) within 60 days.

s/ W.P. Clement, Jr.
Deputy Secretary of Defense

Appendix F

CHAPTER 105.—ARMED FORCES HEALTH PROFESSIONS SCHOLARSHIP PROGRAM

§2120. Definitions

In this chapter—

(1) "Program" means the Armed Forces Health Professions Scholarship program provided for in this chapter.

(2) "Member of the program" means a person appointed a commissioned officer in a reserve component of the armed forces who is enrolled in the Armed Forces Health Professions Scholarship program.

(3) "Course of study" means education received at an accredited college, university, or institution in medicine, dentistry, or other health profession, leading, respectively, to a degree related to the health professions as determined under regulations prescribed by the Secretary of Defense.

Added Pub.L.92-426, §2(a), Sept. 21, 1972, 86 Stat. 717.

§2121. Establishment

(a) For the purpose of obtaining adequate numbers of commissioned officers on active duty who are qualified in the various health professions, the Secretary of each military department, under regulations prescribed by the Secretary of Defense, may establish and maintain a health professions scholarship program for his department.

(b) The program shall consist of courses of study in designated health professions, with obligatory periods of military training.

Appendix F

(c) Persons participating in the program shall be commissioned officers in reserve components of the armed forces. Members of the program shall serve on active duty in pay grade 0-1 with full pay and allowances of that grade for a period of 45 days during each year of participation in the program. They shall be detailed as students at accredited civilian institutions, located in the United States or Puerto Rico, for the purpose of acquiring knowledge or training in a designated health profession. In addition, members of the program shall, under regulations prescribed by the Secretary of Defense, receive military and professional training and instruction.

(d) Except when serving on active duty pursuant to subsection (c), a member of the program shall be entitled to a stipend at the rate of $400 per month.

Added Pub.L. 92-426, §2(a), Sept. 21, 1972, 86 Stat. 717.

§2122. Eligibility for participation

To be eligible for participation as a member of the program, a person must be a citizen of the United States and must—

(1) be accepted for admission to, or enrolled in, an institution in a course of study, as that term is defined in section 2120(3) of this title;

(2) sign an agreement that unless sooner separated he will—

(A) complete the educational phase of the program;

(B) accept an appropriate reappointment or designation within his military service, if tendered, based upon his health profession, following satisfactory completion of the program;

(C) participate in the intern program of his service if selected for such participation;

(D) participate in the residency program of his service, if selected, or be released from active duty for the period required to undergo civilian residency if selected for such training; and

(E) because of his sincere motivation and dedication to a career in the uniformed services, participate in military training while he is in the program, under regulations prescribed by the Secretary of Defense; and

(3) meet the requirements for appointment as a commissioned officer.

Added Pub.L. 92-426, §2(a), Sept. 21, 1972, 86 Stat. 717.

§2123. Members of the program: active duty obligation; failure to complete training; release from program

(a) A member of the program incurs an active duty obligation. The amount of his obligation shall be determined under regulations prescribed by the Secretary of Defense, but those regulations may not provide for a period of obligation of less than one year for each year of participation in the program.

(b) A period of time spent in military intern or residency training shall not be creditable in satisfying an active duty obligation imposed by this section.

(c) A member of the program who, under regulations prescribed by the Secretary of Defense, is dropped from the program for deficiency in conduct or studies, or for other

reasons, may be required to perform active duty in an appropriate military capacity in accordance with the active duty obligation imposed by this section.

(d) The Secretary of a military department, under regulations prescribed by the Secretary of Defense, may relieve a member of the program who is dropped from the program from any active duty obligation imposed by this section, but such relief shall not relieve him from any military obligation imposed by any other law.

(e) Any member of the program relieved of his active duty obligation under this chapter before the completion of such obligation may, under regulations prescribed by the Secretary of Defense, be assigned to an area of health manpower shortage designated by the Secretary of Health, Education, and Welfare for a period equal to the period of obligation from which he was relieved.

Added Pub.L. 92-426, §2(a), Sept. 21, 1972, 86 Stat. 718.